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Order 04-06

MINISTRY OF HEALTH SERVICES

David Loukidelis, Information and Privacy Commissioner
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Summary: Section 21(1) does not require the Ministry to refuse access to rate information in three contracts for computer consulting services, proposals preceding the contracts or a score sheet comparing proposals. Section 22(1) requires the Ministry to refuse to disclose some personal information in the proposals preceding the contracts.

Key Words: third party commercial or financial information – supplied in confidence – competitive position – negotiating position – significant harm – interfere significantly with – undue financial loss or gain – personal information – unreasonable invasion of personal privacy – submitted in confidence – employment, occupational and educational history – financial or other details of contract to supply goods and services.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a), (b) and (c), 22(1), 22(2)(c) and (f), 22(3)(d), 22(4)(f) and (g).

Authorities Considered: B.C.: Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-39, [2001] B.C.I.P.C.D. No. 40; Order 03-02, [2003] B.C.I.PC.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 03-04, [2003] B.C.I.P.C.D. No. 4; Order 03-05, [2003] B.C.I.P.C.D. No.5; Order 03-15, [2003] B.C.I.P.C.D. No.15; Order 03-33, [2003] B.C.I.P.C.D. No. 33. **Ont.:** Order MO-1705; [2003] O.I.P.C.D. No. 232; Order MO-1706, [2003] O.I.P.C.D. No.238.

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Societé Gamma Inc.* v. *Canada (Secretary of State)*, [1994] F.C.J. No. 589 (T.D.); *Promaxis Systems Inc.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 1204 (T.D.); *Ontario (Ministry of Transportation)* v. *Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.).

1.0 INTRODUCTION

[1] This inquiry concerns an access request made to the Ministry of Health Services ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("Act") by an unsuccessful proponent for contract work with the Ministry. The contract work flowed from a November 2001 Invitation to Quote ("ITQ") issued by the Ministry for contract Senior Business Analysts. The access request was for:

(a) the proposals submitted by the three successful proponents;

(b) the score sheet with a detailed breakdown of the scores awarded to the applicant and the three successful proponents for each of the ITQ evaluation criteria;

(c) notes on file concerning the evaluation of the applicant's proposal and the rationale for not choosing that proposal;

(d) the contracts awarded to the successful proponents.

[2] The Ministry identified 100 pages of responsive records, from which it withheld all of pp. 1-67 and parts of pp. 68, 79, 88 and 97 under ss. 17(1), 21(1) and 22 of the Act. The information withheld from the disputed records is the following:

(a) the proposals of the three successful proponents;

(b) information in the Ministry's score sheet comparing proposals, except for most of the score information for the top four proponents;

(c) the daily fee rate, maximum fees and maximum expenses in the contracts entered into with the successful proponents.

[3] The applicant requested a review, under the Act, of the Ministry's decision to withhold information. In his request for review, the applicant said he was concerned about the lack of transparency in the Ministry's competition for Senior Business Analysts. His request for review also made the following contentions:

(a) information in the resumes of the individuals selected to work as Senior Business Analysts has no competitive value and is only required to review the integrity of the competition;

(b) the applicant is seeking a detailed breakdown of his score sheet or an acknowledgement from the Ministry that his proposal was not evaluated or scored against the published criteria;

(c) the applicant is seeking specific references from the Ministry to support the statement on p. 72 of the responsive records that the narrative of his proposal addressed some of the ITQ requirements, but a number were not addressed at all and there was no attempt to address each in a clear and concise manner;

(d) the rate the Ministry pays to the successful proponents is a matter of public interest, especially if the Ministry could have acquired comparable services at a much lower rate.

[4] The matter did not settle in mediation and an inquiry was held under Part 5 of the Act. The Ministry withdrew its reliance on s. 17 of the Act at the time of the inquiry.

[5] All three of the successful proponents support the Ministry's refusal to disclose the disputed information and their representatives have provided supporting affidavits for the inquiry. One successful proponent also made its own brief written submission in the inquiry.

2.0 ISSUES

[6] The issue is whether either s. 21 or s. 22 of the Act requires the Ministry to refuse to disclose disputed information.

[7] The Ministry says s. 21(1) applies to all of the disputed information. Under s. 57(1) of the Act, it is up to the Ministry to prove this.

[8] The Ministry says s. 22(1) applies to information relating to the employees named in each of the three proposals, which it describes as: names, information concerning educational and employment histories, personal references and references to personal skills and abilities. Under s. 57(1) of the Act, it is up to the Ministry to prove disputed information is personal information about a third party. Under s. 57(2), it is up to the applicant to prove that disclosure of third-party personal information would not be an unreasonable invasion of third-party personal privacy under s. 22.

3.0 DISCUSSION

[9] **3.1 The Invitation to Quote** – The ITQ is a three-page document. It begins, under the heading "Background", by saying that the Ministry, as operator of the PharmaCare program, was looking at making changes to contain escalating costs of providing PharmaCare benefits. Under the heading "Service Description", quotations are solicited for proponents to provide three experienced Senior Business Analysts to be part of a team evaluating the feasibility of what are described as "alternative scenarios". The ITQ says that the Ministry intended to select candidates based on stated Evaluation Criteria, regardless of whether the candidates are from the same company or three different companies. Information then follows under each of these headings: "Deliverables", "Qualifications/Experience", "Period of Contract", "Location of Work", "Closing Date and Location", "Pricing", "Evaluation Criteria", "Terms and Conditions" and "Additional Information".

[10] Under Qualifications/Experience, the ITQ states five mandatory requirements and two desirable items.

[11] Under Pricing, the ITQ says the following:

> Proposals must provide an hourly rate. The contract value will be based on 7 hour days for the number of normal working days (excluding weekends and statutory holidays) between the contract signing date and March 31, 2002.
>
> The lowest bid or any other quote will not necessarily be accepted.

[12] Under Evaluation Criteria, the ITQ says:

> It is a **mandatory** requirement that proposals address each of the requirements (both mandatory and desirable) in a clear and concise manner. Proposals that do not include this will not be considered. [bold in original]

[13] The ITQ goes on to assign percentage points to the various evaluation criteria.

[14] The ITQ says nothing about confidentiality.

[15] **3.1 The Disputed Information** – The records relevant to this inquiry are described, by category, below.

Notes Evaluating the Applicant's Proposal

[16] Evaluations of the applicant's proposal were not withheld from the applicant. Pages 72-73 of the responsive records, which were released to the applicant, explain why his proposal was not successful. Page 72 states as follows:

> The ITQ clearly stated the following:
>
> *Evaluation Criteria*
>
> *It is a **mandatory** requirement that proposals address each of the requirements (both mandatory and desirable) in a clear and concise manner. Proposals that do not include this will not be considered.*
>
> The Proposal from [the applicant] did not do this. Although some of the requirements were mentioned in the narrative, a number were not addressed at all and there was no attempt to address each "in a clear and concise manner".
>
> For this reason the proposal from [the applicant], along with half a dozen others, was not considered.

[17] Page 73 is a one-page form. The applicant's name and business, and the number 62 with a circle around it, are handwritten at the top. An item under the heading "PROPOSAL MANDATORIES" states: "Proposals MUST address each of the requirements (mandatory and desirable) in a clear and concise manner to be considered." Beside this item, the word "NO" is handwritten under the heading "FAILED".

Contracts

[18] As indicated in the ITQ, the contracts are standard-form Ministry contracts containing nine pages (including schedules). Each contract is with a corporate contractor and has a term of January 2 to March 31, 2002. Schedule A identifies, by name, the individual computer consultant who will perform the contracted services. Schedule B specifies fees and expenses and the maximum contract amount.

[19] The contracts have been disclosed, including the $42,000 maximum contract amount for each, except for three numbers in Schedule B: the daily fee rate, the maximum fees payable and the maximum expenses payable under the contract.

Proposals

[20] The proposals of the three successful proponents are at pp. 1-67 of the responsive records. Each proposal consists of a cover letter, a document explaining how the successful proponent and the individual computer consultant it is proposing meet the ITQ's requirements, and the resume of the computer consultant. Two of the successful proponents put forward one computer consultant each. One successful proponent put forward three, only one of whom the Ministry selected.

[21] The documents that explain how the successful proponent and its computer consultant meet the ITQ requirements are organized, predictably enough, according to the criteria in the ITQ. The wording of each criterion is lifted out of the ITQ and text, drawn from or elaborating on information in the computer consultant's resume, is inserted beside or below to describe how that person's qualifications and experience meet the criteria.

Score Sheet

[22] The score sheet is a half-page chart at p. 68 of the responsive records. A line at the top indicates that the figures below are post-interview proposal scores updated by response to questions, oral presentation, written submission and reference checks. The chart has 18 lines. Each line lists a proponent and an individual computer consultant. Columns of figures follow under headings for "RATE", for the maximum weight (30) attributable to rate, for the maximum weights attributable to each mandatory and desirable ITQ qualification, and for the maximum possible total weight of 100. From the score sheet the Ministry withheld the:

- name of an individual computer consultant put forward by each proponent,
- proponents' business names, except the top four proponents,
- hourly fee rate put forward by each proponent,
- score for hourly fee rate, except for the top four proponents,
- mandatory and discretionary requirement and total scores, except for the top four proponents.

[23] The following handwritten note accompanies a handwritten arrow pointing to the top proponent: "[Top proponent] NOT AVAILABLE UNTIL APRIL 1/02". The next three proponents on the list ended up being the three successful proponents.

[24] The applicant's name and business are not on the score sheet. The Ministry confirms, at para. 11 of its reply submission, that this is because the applicant's proposal was not considered further after the Ministry decided that it failed to meet the requirement to address each of the mandatory and desirable qualifications in a clear and concise manner.

[25] The Ministry says that, because the access request was confined to score information relating to the applicant and the three successful proponents, only the score information withheld in relation to the three successful proponents—individuals' names, rates and score breakdowns—is in issue in this inquiry and the scores of other proponents are out of scope (reply submission, para. 12). This may be technically correct, but it does not reflect the way the Ministry processed and responded to the access request. The Ministry's response letter withheld information that included all score information for proponents 14 to 18, none of which was a successful proponent. The response clearly states that information was withheld under ss. 17, 21 and 22 of the Act. There is no mention of any information being withheld because it was outside the scope of the access request. An applicant ought to be told when information is withheld because it is out of scope—the Ministry's response left the false impression that score information for proponents 14 to 18 was covered by the access request and had been withheld pursuant to disclosure exceptions in the Act.

[26] I note that the Ministry disclosed score information for the top proponent, except the hourly fee rate, even though that information was out of scope because the top proponent was not one of the three successful proponents. This would seem to confirm that the score information for proponents 14 to 18, except their hourly fee rates, would not fall under a claimed disclosure exception. Otherwise, the Ministry would also have withheld all of the score information for the top proponent.

[27] A higher score for rate indicates that a better (lower) hourly fee rate was given. The successful proponents each scored 12.6 (out of 30) for rate. The top proponent scored 16.7 for rate. Proponents 14 to 18 also had higher scores for rate—indicating a lower hourly fee rate—than the successful proponents.

[28] **3.3 Analysis Under Section 21(1)** – I will now analyze the situation regarding each of the various records.

Notes Evaluating the Applicant's Proposal

[29] No evaluations of the applicant's proposal were withheld, but the applicant says the Ministry's rationale for not choosing his proposal—found at pp. 72-73 of the responsive records—is "ambiguous and not supported by evidence" and requests specific supporting references. He also objects to the fact that the Ministry has not provided

a definition for what is meant by "clear and concise" or articulated what requirements were not addressed in the applicant's proposal.

[30] In doing this, the applicant is really seeking further and better reasons from the Ministry for its rejection of his proposal. This is not a request for access under s. 4 of the Act, for creation of a record from a machine-readable record under s. 6 or for correction of personal information under s. 29. It is also not within the scope of a request for review, inquiry or order under the Act. I will therefore not further address this aspect of the applicant's case.

Contract Information

[31] The Ministry relies on s. 21(1) to withhold the daily fee rate, the maximum fees payable and the maximum expenses payable in Schedule B in of each contract.

[32] Section 21(1), which has been considered in many orders, applies only when paras. (a), (b) and (c) of that section are all satisfied. In Order 03-02, [2003] B.C.I.P.C.D. No. 2, at paras. 28-117, I canvassed the history of third-party business exceptions in Canadian access to information legislation, as well as many commissioner and court decisions. Order 03-02 was accompanied by two other s. 21(1) cases involving the same public body, Order 03-03, [2003] B.C.I.P.C.D. No. 3, and Order 03-04, [2003] B.C.I.P.C.D. No. 4. Since those orders, I have considered s. 21(1) in Order 03-05, [2003] B.C.I.P.C.D. No. 5, Order 03-15, [2003] B.C.I.P.C.D. No. 15, and Order 03-33, [2003] B.C.I.P.C.D. No. 33.

[33] Last autumn, Adjudicator Bernard Morrow issued, under Ontario's *Freedom of Information and Protection of Privacy Act*, two important orders, Order MO-1705, [2003] O.I.P.C.D. No. 232, respecting the York Region District School Board and Order MO-1706, [2003] O.I.P.C.D. No. 238, respecting the Peel District School Board. Those orders required the institutions to give access to exclusive pouring-rights agreements between the school districts and third-party cold beverage companies. There are significant parallels between these Ontario orders and my Order 01-20, [2001] B.C.I.P.C.D. No. 21, which required access to be given to an exclusive pouring-rights agreement between the University of British Columbia and Coca-Cola Bottling Ltd.

[34] Ontario Order MO-1705 concerned the proposal that a cold beverage company submitted to a school district. The school district and the cold beverage company subsequently agreed to the proposal orally and operated under it for three years without the benefit of a signed final written agreement. Adjudicator Morrow ordered access to be given to the record, which he concluded had changed after its submission to the school district from a proposal to a document reflecting the terms of an oral agreement.

[35] Ontario Order MO-1706 concerned the proposal that a cold beverage company submitted to a school district and the written contract subsequently entered into by the parties. Adjudicator Morrow required access to be given to both records.

[36] Turning to the situation here, I agree with the Ministry that the information withheld from the contracts falls under s. 21(1)(a) of the Act, as commercial or financial information about the successful proponents. It is also, of course, about the Ministry.

[37] I have concluded, for the following reasons, that the requirements of s. 21(1)(b) and (c) are not met.

[38] I will begin by analyzing the "supply" element in s. 21(1)(b). The Ministry disclosed, properly, the aggregate total fees and expenses for each contract ($42,000). Its rationale for withholding the daily fee rate is that it is commercial or financial information about the contractors that was supplied to the Ministry in confidence and its disclosure could reasonably be expected to result in harm under s. 21(1)(c).

[39] The Ministry's rationale for withholding the maximum fees payable and the maximum expenses payable under each contract is not that these amounts were supplied in confidence. Rather, the Ministry says that, because the terms of the contracts are known (January 2 to March 31, 2002) and the contract values are known to be based on a 7-hour day for normal working days (excluding weekends and statutory holidays), the disclosure of the breakdown of aggregate contract value into maximum fees and maximum expenses would permit the daily fee rate to be calculated by simple arithmetic.

[40] I agree that this is so. It is also clear that the daily fee rate then simply needs to be divided by seven to get the hourly fee rate.

[41] The daily fee rate is the key to the Ministry's application of s. 21(1) to the three contract figures that have been withheld. If s. 21(1) does not require the Ministry to deny access to the daily fee rate, then there is no argument that it requires access to be refused to the maximum fees or the maximum expenses. The Ministry has withheld those figures only because the daily fee rate can be derived from them by a simple and obvious calculation.

[42] The Ministry's argument and evidence on "supply" under s. 21(1)(b) are summarized as follows in its initial submission (paras. 4.20-4.22) (supporting affidavit paragraph references are omitted):

> The ITQ process entailed that once a proponent was selected, the rate that they submitted in their bid would automatically become the rate that would appear in the contract between the parties. (Pricing constituted 30% of the overall evaluation of the bids.) The daily and aggregate amount fee amounts that appear in Schedule 'B' of the contracts between the Ministry and the successful proponents were derived from the hourly rates that the successful proponents submitted as part of their bids to the Ministry. There was no negotiation between the Ministry and the proponents with respect to those rates.
>
> The Ministry submits that the "supply" requirement is met in this case. The Ministry submits that the rate information in the contracts at issue, if disclosed, would permit someone to draw an accurate inference as to information that was supplied in confidence by the corporate third parties (namely, hourly rates) in their

> bids. Each of the proponents to the ITQ was aware that the hourly rate that they supplied in their bids would form the basis of the fee structure in any agreement that resulted in the event that they were a successful proponent. As such, disclosure of the rate information in the contracts at issue would result in a reader drawing an accurate inference concerning the hourly rates that were supplied by each of the corporate third parties in their bids, being information that is protected from disclosure under section 21 of the Act. There was absolutely no negotiation between the parties as to the fees that would be payable under the contract, a fact that makes this case distinguishable from the circumstances dealt with in Order 00-22.
>
> The Ministry submits that any disclosure of the rate information at issue would result in a reader drawing an accurate inference concerning the cost structure of the corporate third parties. There is a direct link between a computer consulting business'[s] fee structure (the rates it charges its customers) and its cost structure. The rates a business charges are calculated by taking its costs (including staff salaries and overhead) and adding its intended profit margin. Staff salaries are the biggest component for computer consulting businesses. The Ministry submits that any disclosure of the rate information at issue in this inquiry could reasonably be expected to result in the competitors of the corporate third parties being able to draw an accurate inference about the costs (salaries and overhead) of those third parties. If you know a competitor's costs, you can estimate the lowest possible bid that the competitor would be willing to tender because, generally speaking, businesses do not want to lose money on a particular contract. As such, a competitor that can estimate the costs of a rival business can then tender a bid that it can live with, but which it knows that its competitor will not or cannot offer. Such knowledge would give a competitor a significant, and unfair, competitive advantage.

[43] I do not find these arguments, and related evidence, persuasive for several reasons.

[44] The Ministry says that "[t]he ITQ process entailed that once a proponent was selected, the rate that they submitted in their bid would automatically become the rate that would appear in the contract between the parties". Looking at the ITQ, however, it simply said that the Ministry "intends to select the best three candidates based on the stated Evaluation Criteria", and that "[t]he lowest bid or any other quote will not necessarily be accepted". The ITQ did not preclude the Ministry from requesting or requiring a proponent to amend terms of its proposal before the proponent would be selected, or from identifying the most qualified proponents, then bargaining them down on price before selecting successful proponents.

[45] Further, I have often said that information in an agreement negotiated between a public body and a third party will not normally qualify as information that has been "supplied" to the public body. The exceptions to this tend to be information that, though it is found in a contract between a public body and a third party, is not susceptible to negotiation and change and is likely of a proprietary nature.

[46] Accordingly, the fact that a term from a proposal (hourly fee rate) is incorporated in a contract (daily fee rate based on a seven-hour day) does not signify that the contract term (daily fee rate) was "supplied", and not negotiated, information. See Order 03-15, paras. 57-65, Order 03-02, para. 60, Order 01-39, [2001] B.C.I.P.C.D. No. 40, paras. 44-50, and Order 01-20, para. 93. As I said in Order 03-15, at paras. 65 and 66:

> … Just because an expense in a proposal, or a contract, remains the same despite the variation of other terms (such as the number of inmates in the VIRCC) does not mean that it is a fixed cost of the contractor. All that is really signified is that there is a continuing flat charge by the contractor to the Ministry. The "cost" is to the Ministry in order to contract for the services involved. JMHS, without a doubt, also has costs, but it cannot be assumed that the annual cost figures that have been withheld by the Ministry must be fixed costs to JMHS. JMHS can be expected to seek some profit out of the contract. It may also be able to increase its own efficiencies and to bargain down its own costs.
>
> An RFP process aims to generate competitive proposals from qualified parties for the provision of goods or services to government. If all goes well, it leads to the government contracting with one, or more, of the proposing parties to provide the goods or services sought. It would hardly be surprising that terms in a contract arrived at resemble, or are even the same as, terms in the contractor's proposal. It might well be more unusual for the contract arrived to be completely out of step with the terms of the contractor's proposal. A successful proponent on an RFP may have some or all of the terms of its proposal incorporated into a contract. As has been said in past orders, there is no inconsistency in concluding that those terms have been "negotiated" since their presence in the contract signifies that the other party agreed to them. This is not changed by the Ministry's contention that terms in the Health Services Agreement were not negotiated, or even negotiable, because the Ministry believes that it simply accepted terms proposed by JMHS.

[47] The contracts here are simple agreements for each contractor, through an identified computer consultant, to provide the Ministry with services. The daily fee rate in the contract is a charge-out value for a seven-hour day. One would expect the charge-out value (whether it is described on an hourly or daily basis) to take into account the contractor's costs to provide the services (of which paying the computer consultant would be one) and contractor profit margin (unless the contractor is, for some larger business reason, contracting without an expectation of profit). The Ministry and its witnesses say that contractors' costs such as salary and overhead could be accurately inferred from the charge-out value. No explanation is offered of how this is, or could be, so.

[48] The daily fee rate may bear a relationship to the contractor's cost structure in that a contractor could be expected to charge a customer more than cost in order to make a profit on a transaction. It does not follow that the fee bargain struck between the contracting parties constitutes or reveals an immutable contractor cost that has been "supplied" to the Ministry.

[49] Last, when information in a proposal is incorporated into a contract, the mere fact that disclosure of the contract will reveal information that was in the proposal does not

shield the contract from disclosure on the basis that it reveals underlying confidentially-supplied information. See Order 01-39, paras. 50 and 54, and Order 01-20, paras. 87 and 95. A recent case in point is Ontario Order MO-1705, where it was held that, when the proposal changed into the terms of an oral contract, those terms were not "supplied". Adjudicator Morrow stated as follows, at p. 10:

> I accept as a practical matter, the affected party physically supplied the proposal to the Board. Had the appellant sought access to the proposal immediately after it was submitted, it may well have met with the "supplied" test. However, circumstances changed significantly over the ensuing months. First, the Board announced the affected party as the winning bidder, and accepted the affected party's proposal. Second, the Board and the affected party then entered into an oral agreement to proceed on the basis of the terms set out in the proposal. Third, the parties began to act in accordance with the terms of the proposal, which is most clearly evidenced by the presence of the vending machines in the Board's schools. The appellant made his request after these events had occurred. In my view, at the time of the request, the nature of the proposal, read as a whole, had changed from constituting a mere proposal to a document reflecting the terms of an oral agreement. In other words, the oral agreement incorporated by reference the essential terms of the proposal. Therefore, in my view, many of the withheld portions of the proposal are properly considered to be the terms of a contract, which do not meet the "supplied" test in section 10(1). As indicated above, the fact that contractual terms are proposed by a third party and agreed to with little discussion does not lead to the conclusion that they must have been supplied.

[50] I find that the contract information withheld by the Ministry here was not "supplied" within the meaning of s. 21(1)(b).

[51] I will now examine the "in confidence" element in s. 21(1)(b). The ITQ says nothing about confidentiality. Each contract requires the contractor to keep confidential all material it receives or produces as a result of the contract, but there is no confidentiality obligation on the Ministry and no provision for confidentiality of information in the contract itself. Representatives of the successful proponents have provided affidavit evidence as to their expectations of confidentiality. However, the affidavits of the Ministry personnel are silent on any expectation of confidentiality. The following excerpt from the affidavit of one representative of a successful proponent typifies the affidavit evidence on expectation of confidentiality:

> When [name of proponent] submitted its Bid to the Ministry it understood that the information contained therein would be used solely for the purpose of the Ministry evaluating the Bid as part of the ITQ and that the information submitted by [name of proponent] would not be used or disclosed for any other purpose. [Name of proponent] supplied the Bid implicitly in confidence. [Name of proponent]'s expectation concerning confidentiality of the Bid was based on the fact that it is industry practice to keep such bid information confidential. I am not aware of any previous case where bid information has been disclosed by a client or potential client to a third party.

> The hourly rates included in the Bid are confidential information of [name of proponent] and are not published by [name of proponent] or available to competitors.

[52] The proposals of two of the successful proponents are silent on confidentiality. The proposal of the third successful proponent does address confidentiality, as follows (from p. 13 of the disputed records):

> **Confidentiality**
>
> This proposal contains information which is proprietary and confidential to [name of proponent]. This information is provided for the sole purpose of permitting the recipient to evaluate the proposal. In consideration of receipt of this document, the recipient agrees to treat information as confidential and to not reproduce or otherwise disclose this information to any persons outside the group directly responsible for the evaluation of its contents, without the prior written consent of [name of proponent].
>
> [Name of proponent] reserves the right to request that all copies of the proposal be returned by the recipient at the conclusion of the evaluation process.

[53] I conclude that the "in confidence" element in s. 21(1)(b) is not met. Neither the ITQ nor the contracts evidence an intention for the contracts to be confidential. Ministry personnel have furnished no evidence on the issue. Representatives of the successful proponents have deposed that, based on what they describe as industry practice, their proposals were implicitly provided in confidence. Even putting this evidence at its highest, it goes to the proposals, not contracts, and it does not address any mutuality of understanding between the Ministry and the contractors (which is also not supported by the silence of the ITQ and the contracts on the confidentiality question). One of the successful proponents included the above-quoted confidentiality provision in its proposal. That provision went to information in the proposal, not to the terms of the contract subsequently agreed to by the parties. The fact that the parties agreed to the fee rate given by the contractor in its proposal does not translate proposal confidentiality into contract confidentiality. The parties contracted and the contract contains no provision for its confidentiality.

[54] I will now examine whether harm under s. 21(1)(c) has been established. The Ministry summarizes its argument and evidence on why disclosure of fee rate information—hourly, daily and aggregate—could reasonably be expected to result in harm under s. 21(1)(c)(i) as follows (initial submission, paras. 4.32-4.36):

> … The Ministry submits that the evidence demonstrates that disclosure of the rate information at issue (being hourly rate, daily rate and aggregate rate) could reasonably be expected to harm significantly the competitive advantage of the corporate third parties.
>
> Cost is an important component in computer consulting tenders. Pricing is an especially critical component in bids for supplemental services contracts because the client is buying the consultant's time, not a technical solution. By contrast, if

> the client were looking for a technical solution, the client would expect to pay for the right solution, even if it were not the lowest or a low cost solution.
>
> The competition for service contracts dealing with business analyst and computer consulting services is very competitive. Victoria is an especially competitive environment, given that there are many qualified consulting firms and business analysts vying for a small and dwindling number of available jobs. In addition, competition for local jobs in [*sic*] heightened by virtue of the fact that, in addition to local consulting businesses and sole practitioners vying for a small number of local service contracts, a recent trend has seen firms outside Victoria (including Vancouver, Edmonton and Calgary) also vying for such contracts. This increases the overall competitiveness of the area.
>
> Though pricing is not a sole determinant in choosing the service providers pursuant to the ITQ, it is a significant consideration. Price accounted for 30% of the overall evaluation. Similarly, the pricing component of a bid will almost always be a component of the evaluation of bids, although the extent of that component may vary from bid to bid.
>
> A proponent's ability to underbid its competitors can make the difference between winning or losing a contract. The Ministry submits that the disclosure of the information at issue into the public domain would assist competitors of the corporate third parties in their future attempts to underbid them. The competitors of the corporate third parties would then know what price the corporate third parties was [*sic*] willing to bid in relation to tenders of this type. If the rate information at issue were to get into the hands of competitors of the corporate third parties, those competitors could use that information to underbid the corporate third parties in order to potentially win future contracts, which would result in a loss of revenue for the corporate third parties.

[55] It has been said on many occasions that a reasonable expectation of harm from disclosure requires more than speculation and generalization. See, for example, Order 03-03, paras. 41-43, and Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 111-112, 124-137. In Order 02-50, when analyzing whether harm had been established for the purposes of s. 17(1), I distilled the effect of leading decisions on reasonable expectation of harm under access to information and privacy legislation as follows (paras. 136-137):

> The Ontario Court of Appeal held, in *Big Canoe* [v. *Ontario (Minister of Labour)* (1999), 181 D.L.R. (4th) 603 9Ont. C.A.)], that "more likely than not" was an unreasonably high formulation in the context of risk of harm to personal safety. In *Workers' Compensation Board* [v. *Ontario (Information and Privacy Commissioner)* (1998), 164 D.L.R. (4th) 129 (Ont. C.A.)], it found that the words "detailed and convincing" appropriately describe the quality of evidence required to satisfy the onus of establishing a reasonable expectation of harm. In *Lavigne* [v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773], the Supreme Court of Canada, in the context of disclosure claimed to be detrimental to the conduct of lawful investigations, adopted the language of Richard J. in *Canada (Immigration and Refugee Board)* [v. *Canada (Immigration and Refugee Board)*, [1997] F.C.J. No. 1812 (T.D.).], above, *i.e.*, that a reasonable expectation of probable harm implies a "confident belief". That Court also said there must be a clear and direct connection between disclosure of specific

> information and the injury alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure.
>
> Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information. A Ministry or government preference for keeping the disputed information under wraps in its treaty negotiations with Lheidli T'enneh will not, for example, justify non-disclosure under s. 17(1). There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.

[56] Returning to the contracts at hand, the Ministry advances the following propositions:

- competition is fierce for government computer consulting contracts in Victoria;
- pricing, while not the sole determinant, is critical to competing successfully;
- being underbid on price is a serious competitive risk for the successful proponents;
- disclosure of the rate information in the contracts would assist competitors to underbid the successful proponents in future tenders of this type.

[57] The theory of serious competitive harm from underbidding on price is undermined in concrete terms, however, by the score sheet, because it indicates that merit qualifications were critical to success and better fee rate scores were not. The successful proponents had a lower rate score than all other proponents—including the top proponent—indicating that the successful proponents were uniformly underbid. Even though proponents 14 to 18 had better rate scores than the successful proponents, some by a very considerable margin, their total scores did not exceed the successful proponents' because they did not compete well enough on merit factors.

[58] As the Supreme Court of Canada said in *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged. I find that has not been established in this case. The evidence that is concrete and specific actually indicates an absence of underbid risk to the successful proponents from disclosure of rate information. In the words of s. 21(1)(c), I find that the evidence before me in this case does not establish that disclosure could reasonably be expected to harm significantly the competitive positions of the successful proponents, or interfere significantly with their negotiating positions, or result in undue financial loss to the successful proponents or undue financial gain to someone else.

[59] The issue of whether disclosure could reasonably be expected to result in harm under s. 21(1)(c) is fact-dependent and therefore usually case-specific. When contract cost information is involved, it may consist of a contract daily/hourly charge-out value—as in this case and in one contract considered in Order 03-15—or it may be a line-by-line breakdown of how the contractor will meet overall contract service obligations through time-specific allocations for a variety of supervisory, professional, administrative and clerical personnel, as it was in Order 02-22, [2000] B.C.I.P.C.D. No. 25, and in the second contract considered in Order 03-15. The particular content and detail of the contract cost information may affect whether disclosure could reasonably be expected to significantly harm competitive position, interfere significantly with negotiating position or result in undue financial loss or gain. Also, as I observed in Order 00-10, [2000] B.C.I.P.C.D. No. 11, at p. 11, the extent of the harm in relation to the assets or revenues of the third party may be relevant in determining whether a feared harm is significant under s. 21(1)(c)(i).

[60] When interpreting and applying the s. 21(1) disclosure exception, the stated purposes of the Act to make public bodies more accountable, by giving the public a right of access to records that is subject to specified limited exceptions, must be kept in sight. The overarching principle is that contracts with public bodies should be available to the public, subject only to specified and limited disclosure exceptions in the circumstances of each case.

[61] Not surprisingly, the Federal Court has held that a mere "heightening of competition" is not interference with contractual or other negotiations under s. 20(1)(d) of the federal *Access to Information Act*. An obstruction in actual negotiations must be shown. See *Societé Gamma Inc.* v. *Canada (Secretary of State)* (1994), 79 F.T.R. 42, and subsequent cases such as *Promaxis Systems Inc.* v. *Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 1204 (T.D.). This is even more true for s. 21(1)(c)(i) of the Act, in that it requires the interference with negotiating position to be significant.

[62] I observed in Order 03-15 that simply putting contractors and potential contractors to government in the position of having to price their services to government competitively is not a circumstance of unfairness or undue financial loss or gain. This remark was made with reference to s. 17(1)(d), but it applies to s. 21(1)(c)(iii) as well.

Score Sheet

[63] My analysis is confined to the applicability of the disclosure exceptions claimed—s. 21(1) and s. 22(1)—to the withheld information that is within the scope of the access request, namely:

- names of the three selected individual computer consultants
- hourly fee rates put forward by the successful proponents

[64] Some of the out of scope information in the score sheet is nonetheless relevant to whether s. 21(1) requires the Ministry to deny access to the contract daily fee rate, as evident from the contract information analysis above.

[65] The Ministry has applied s. 22(1) to the names of the selected individual computer consultants. Section 22(1) requires the Ministry to refuse access to personal information if disclosure would be an unreasonable invasion of third-party personal privacy. The names are personal information. The applicant says he is not seeking information that identifies individuals and suggests that information can be severed (reply submission, p. 2). It is therefore unnecessary to determine if the Ministry is required to refuse access to these names. The issue is moot, as well, because Schedule A to each contract identifies, by name, the individual providing the contracted services. The Ministry properly, in light of s. 22(4)(f), disclosed this information to the applicant. Section 22(4)(f) provides that disclosure of personal information is not an unreasonable invasion of third-party personal privacy if it reveals financial and other details of a contract to supply goods or services to a public body. Finally, access to the names is also a moot point, because they were disclosed in the Ministry's submissions and the individual computer consultants' affidavits provided in this inquiry.

[66] Turning to s. 21(1), I find it does not require access to be denied to the successful proponents' hourly rates in the score sheet. Even if the s. 21(1)(b) analysis led to a different result for the rate information in the score sheet than the rate information in the contracts, the result for s. 21(1)(c) is the same. As I concluded with respect to the contracts, it has not been established that disclosure of hourly fee rates of the successful proponents could reasonably be expected to result in harm under s. 21(1)(c).

[67] I also wish to commend the Ministry for its release of the remainder of the requested score information. As was said by the Ontario Divisional Court in a recent decision, *Ontario (Ministry of Transportation)* v. *Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224, at para. 86:

> The ability of the public to scrutinize the bases upon which government contracts are awarded is an important aspect of public accountability. Subject to the proprietary interests of third parties, the approaches taken by the government, the criteria against which tender documents are assessed, and the degree to which proponents satisfy those criteria, are all integral to the ability of the public to assess the operations of government and to hold it accountable for the use of public funds.

[68] Accessibility of the requested score information is an important aspect of the public accountability that underpins the right of public access in the Act. The hourly fee rates are not proprietary to the successful proponents and s. 21(1) does not require them to be withheld.

Proposals

[69] The Ministry has applied s. 21(1) to all information in the proposals and says that s. 22(1) also applies to personal information, which it describes as: employee names,

information concerning educational and employment histories, personal references and references to personal skills and abilities.

[70] I will first address s. 22(1). The applicant says he seeks full disclosure of all information used by the Ministry in selecting proposals but that this need not include the identities of individuals proposed or contracted to perform the work, which can be severed before disclosing the details of their education, employment histories and references to their skills and abilities. This resolves the withholding of most of the names of individuals in the proposals. It does not answer, however, the selected individual computer consultants' concern that the details of their education, employment histories and references to their skills and abilities are personal information, even if their names are excised, because that information can easily be linked to them identifiably through their names in Schedule A of the contracts.

[71] The Ministry correctly observes that s. 22 is a mandatory exception and the burden falls on the applicant to establish that disclosure of personal information of the selected individual computer consultants would not be an unreasonable invasion of their personal privacy.

[72] The applicant relies on the factors in s. 22(2)(a) and (c) (disclosure desirable for the purpose of subjecting the activities of the Ministry to public scrutiny and personal information relevant to a fair determination of the applicant's rights), as well as the s. 22(4)(f) and (g) deeming provisions (disclosure revealing financial or other details of a contract to supply goods or services to a public body and information publicly accessible under the *Financial Information Act*). He also cites s. 22(5).

[73] The Ministry says the provisions the applicant relies on are not pertinent and refers to the factor in s. 22(2)(f) (personal information supplied in confidence), and the presumption in s. 22(3)(d) (personal information relating to employment, occupational or educational history).

[74] I agree with the Ministry that the applicant's reliance on s. 22(2)(c)—personal information relevant to a fair determination of the applicant's rights—does not resonate here. In reaching this conclusion, I have considered the s. 22(2)(c) factors described in Order 01-07, [2001] B.C.I.P.C.D. No. 7.

[75] I agree with the Ministry that the resumes submitted with the proposals fall under s. 22(3)(d) and they do not fall under s. 22(4)(f) and (g). The information in the resumes does not form part of the financial or other details of the contracts. Nor does the *Financial Information Act* require public access to that information. I also agree with the Ministry that the applicant's reliance on s. 22(5) is misplaced because it is not his personal information that is in issue.

[76] Turning to s. 22(2)(c), the applicant argues that proponents were never given an expectation that their proposals or the decision-making process would be concealed from public scrutiny. Some support for this assertion may be taken from the fact that the ITQ

says nothing about confidentiality and from the absence of evidence from Ministry officials respecting receipt of information in confidence.

[77] The selected individual computer consultants each depose, however, to their expectation that their personal information would not be publicly disclosed. One of the individuals deposes as follows:

> When I submitted my resume and the information in the above mentioned form as to how I met or exceeded the ITQ criterion to the Ministry, I understood and expected that such personal information would be used or disclosed solely for the purpose of the Ministry selecting 3 Senior Business Analysts and that such information would not be used or disclosed for any other purpose. That expectation was based on the fact that the information was personal in nature and on my understanding that it is customary business practice for bid information to be kept confidential. I have not experienced any case where bid information has been publicly disclosed.
>
> When I submitted [name of proponent]'s bid to the Ministry I understood that I was supplying the entire contents of that bid (including all of the information referred to in paragraph 6 of my affidavit) to the Ministry in confidence and that such information would be used solely for the purpose of evaluating that bid. Though I did not expressly refer to that expectation in [name of proponent]'s bid, I did supply the information referred to in paragraph 6 to this affidavit to the Ministry in confidence.

[78] Another deposes as follows:

> In advance of [name of proponent] responding to the ITQ, I was asked by my employer to provide a copy of my resume and to fill out the form that listed the mandatory and optional criteria specified by the Ministry in the ITQ. Specifically, I was asked by my employer to fill in the spaces in a form that corresponded to each of the listed criteria, i.e. to add information concerning how my past employment experience, education and/or skills met or exceeded the criterion listed by the Ministry in the ITQ.
>
> In drafting the resume my employer requested, I considered the criteria set out by the Ministry in the ITQ. In other words, I included in my resume any of my experiences, education and/or skills that related to the criterion specified in the ITQ. Upon completing my resume, I provided a copy of it to my employer.
>
> When I provided my resume to my employer and provided it with the requested information in the above-mentioned form, I understood and expected that the information that I provided about myself in those records would only be used or disclosed for the purpose of [name of proponent] seeking a contract from a potential client and that such information would not be used or disclosed for any other purpose. I did not expect that such information would be publicly disclosed.
>
> My expectation concerning the confidentiality of the Information was based on the fact that industry practice is to keep bid information confidential and on the fact that such information concerns me personally.

> I have concerns about a complete stranger having access to my complete employment and educational history and not knowing how they intend to use that information or whether they will share that information with someone else.

[79] The evidence of the third computer consultant is very similar to the above passage and the proposal relating to that person also contained the confidentiality provision quoted in the discussion of contract information.

[80] I find that, although the evidence respecting s. 22(2)(f) is strongest for the proposal that contains the confidentiality provision, it is inconclusive for all three proposals because of the absence of evidence from the Ministry side or any representation about confidentiality in the ITQ. In light of the presumption in s. 22(3)(d) and the individuals' evidence of their concern about "strangers" having access to their resume information, however, I still conclude that the resumes and the resume type information in the records describing how the successful proponent and the individual computer consultants meet the ITQ requirements is personal information, the disclosure of which would be an unreasonable invasion of third party personal privacy. I am not persuaded that s. 22(2)(a) is a sufficiently compelling factor in favour of disclosure of this information. It is therefore protected from disclosure under s. 22(1). I have also marked, on a copy of the disputed records to be provided to the Ministry, some names (not sought by the applicant) and some protected resume-type personal information in the cover letters that accompanied the proposals (disputed records pp. 1, 14, 37-40).

[81] I will now examine the applicability of s. 21(1) to the remaining information in the proposals.

[82] As indicated above, the records that explain how a successful proponent and individual computer consultant meet the ITQ requirements are organized according to the criteria in the ITQ. The wording of each criterion is taken out of the ITQ and text drawn from or elaborating on information in the computer consultant's resume is inserted beside or below to describe how that criterion is met by that person's qualifications and experience.

[83] In my view, information taken from the ITQ is not financial or commercial information about the proponent under s. 21(1)(a) and it is not supplied in confidence under s. 21(2)(b). Further, as with the s. 22(2)(f) analysis, I find the evidence of expectation of confidentiality is inconclusive for the hourly fee rates, cover letters and other remaining material in the proposals.

[84] The Ministry's argument and evidence on harm under s. 21(1)(c) are summarized as follows in its initial submission, at paras. 4.42-4.43 (supporting affidavit paragraph references are omitted):

> The Ministry submits that the disclosure of information from the bids of the corporate third parties would enable a competitor to learn how those third parties structured and presented their bids. Having access to such information would assist competitors in competing with corporate third parties in future tenders, with the

> potential that they could beat out the Third Parties. The Ministry submits that any disclosure of the bid information at issue could reasonably be expected to harm significantly the competitive position of the corporate third parties and result in undue financial loss to them and undue financial gain to their competitors.
>
> The Ministry submits that allowing the competitors of the Third Parties to have access to their bid information would be inappropriate, unsuitable, improper, unrightful, unjustifiable and thus "undue" within the meaning of section 21(1)(c)(iii). The successful proponents in this case did a thorough and clear job of communicating their qualifications. Those efforts required resources. The Ministry submits that disclosure of the information in the bids would provide unsuccessful applicants with a blueprint as to how to draft proposals without having to invest their resources to do so. Competitors would be able to have a competitive advantage over the corporate third parties, while at the same time they would not have to invest their own resources (as did the corporate third parties) into developing a superior manner and style of presenting their bids.

[85] Formatting a proposal to list and then address each ITQ criterion in turn is generic and rudimentary common sense. It is, with respect, overblown to describe this as a blueprint for success requiring the investment of resources by the successful proponents. I conclude that disclosure of the way the proposals are formatted under headings for each criterion in the ITQ could not reasonably be expected to result in harm under s. 21(1)(c).

[86] For reasons already given above respecting the contract information and the score sheet, I also find that disclosure of hourly fee rates in the proposals could not reasonably be expected to result in harm under s. 21(1)(c).

[87] The remaining proposal material that need not already be withheld under s. 22(1) (disputed records pp. 1, 12-17, 39-40) is general and generic, from the ITQ, or customer references in the form of projects with the Ministry itself or names of some large public bodies and charitable or professional organizations. I also find that the disclosure of this information could not reasonably be expected to result in harm under s. 21(1)(c).

[88] **3.4 Other Issues** – The applicant says in his submissions, and elaborates in an *in camera* submission, that the Ministry and others have access to confidential health information about him. He says this information should not have been considered in connection with the ITQ, but he suspects it was and wants to investigate and verify this further.

[89] Without wishing to minimize or support the applicant's concern that the Ministry rejected his proposal because it was improperly influenced by confidential health information about him, I agree with the Ministry that exploring or resolving this issue is not the object of this inquiry.

[90] I appreciate that the applicant wants to obtain access to information in the successful proposals in order to show that his proposal was indeed the best one, or at least better than the proposals of the successful proponents, and to use this to support his

suspicion that his proposal was rejected for improper reasons. An inquiry under the Act is not, however, a forum for appealing the results of government contract bids or job competitions. Further, the applicant's request for review and this inquiry are about whether the Ministry properly applied disclosure exceptions to records requested by the applicant under the Act, not about whether the Ministry collected or used personal information of the applicant in contravention of the Act. At para. 12 of its reply submission, the Ministry has very properly indicated that it would be happy to address, outside of this inquiry, any privacy concerns the applicant may have.

4.0 CONCLUSION

[91] I make no order respecting notes evaluating the applicant's proposal because the Ministry has not withheld any from him.

[92] I make the following orders under s. 58 of the Act:

1. Section 21(1) does not require the Ministry to deny access to the information it has withheld from the contracts. Under s. 58(2)(a), I require the Ministry to give the applicant access to that information.

2. Section 22(1) does not require the Ministry to deny access to the names of the computer consultants for the successful proponents on the score sheet. Under s. 58(2)(a), I require the Ministry to give the applicant access to that information.

3. Section 21(1) does not require the Ministry to deny access to the hourly fee rate information for the successful proponents on the score sheet. Under s. 58(2)(a), I require the Ministry to give the applicant access to that information.

4. Section 22(1) requires the Ministry to deny access to the resumes provided with the proposals (disputed records pp. 5-11, 25-36, 41-43, 48-51, 55-60) as well as to the resume-type information I have marked on a copy of the disputed records and provided to the Ministry with this order. Under s. 58(2)(c), I require the Ministry to deny access to that information.

5. Section 21(1) does not require the Ministry to deny access to information in the remainder of the disputed records. Under s. 58(2)(a), I require the Ministry to give the applicant access to that information.

March 4, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia